No. 97-1118 (4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENTS HAVE PRESENTED NO ARGUMENT OR AUTHORITY IN OPPOSITION TO PETITIONER'S CLAIM THAT, HAVING RECEIVED AN ADVERSE ACTION WHICH RESULTED IN THE LOSS OF PROPERTY (SALARY) AND PRIVILEGE (FLIGHT TIME), HE NEVER RECEIVED ANY HEARING, AND THEREFORE WAS DENIED DUE PROCESS.

The issue before the Court is whether Petitioner was denied due process for never having received any hearing or trial, subsequent to Petitioner's loss of federally protected rights of both property (salary) and privilege (flight time).

The Respondents would have the Court believe they don't have to actually provide Petitioner a hearing: they only have to *promise* that they will. This amazing premise is evidenced in the following statement:

> Respondent CAHP contends that the fundamental requirement for due process is not whether a hearing was conducted but whether Petitioner had the opportunity to be heard at a meaningful time in a meaningful manner.

(CAHP Brief in Opposition, p. 1). This flawed premise is in direct contravention to the law.

The Petition makes it abundantly clear that this Court has long held that denial of *any* hearing following the loss of federally protected rights is an absolute denial of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Parratt v. Taylor*, 451 U.S. 527, 540, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

The Respondents have provided absolutely no argument or authority to overcome the laws concerning denial of due process provided by Petitioner. Respondents are now prohibited from raising any objection or providing any authorities, per United States Supreme Court Rule 15.2.

Respondent CHP and individual CHP Respondents Balducki, Bean, Dimino, Jones, Rengstorff, Towle, and Tuck, failed to submit any argument in opposition and are now prohibited from doing so by United States Supreme Court Rules 15.2 and 15.3.

II.

RESPONDENT DPA FALSELY CLAIMS THAT, AS A STATE AGENCY, IT IS PROTECTED FROM FEDERAL SUIT BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent DPA's claim is non responsive to the only issue in the Petition before this Court, *i.e.* whether Petitioner was denied due process by having been denied any hearing or trial, following a loss of federally protected rights of property (salary) and privilege (flight time). Respondent DPA's claim that it is protected from suit by the Eleventh Amendment, does not overcome the issue before this Court of the denial of Petitioner's due process rights. In any event, Respondent DPA's claim that it is protected from suit, by the Eleventh Amendment, is false for the following reasons.

Petitioner's suit is based solely on denial of his due process rights. Petitioner is not seeking monetary relief or any retroactive relief from the state agencies. He is seeking *only* prospective injunctive relief from the state agencies involved (CHP and DPA). That specifically defeats any claim of Eleventh Amendment protection by those state agencies.

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) states:

> A federal courts remedial power, consistent with the 11th amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the treasury.

Respondent DPA's claim that Petitioner is seeking retroactive relief from a state agency, is false. Respondent DPA's claim that Petitioner is seeking monetary relief from a state agency, is false. Respondent DPA's claim that Petitioner has made no request for injunctive relief, is false. The state agencies in the instant case, have no protection under the Eleventh Amendment.

In addition, the individual Respondents and Does of the state agencies have no protection under the Eleventh Amendment because a suit challenging the federal constitutionality of a state official's action is not one against the state. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The Defendants denied Petitioner due process, having failed to provide a hearing following loss of federally protected rights of property (salary) and privilege (flight time). Failure to provide due process strips the individual Defendants of any protection under the Eleventh Amendment. An unconstitutional state enactment is void, and any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.

Young, supra, at 159-160 states:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution,

> the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In the instant case, in addition to the state agency Respondents and Does, not having any protection under the Eleventh Amendment; the individual Respondents and Does of the state agencies have no protection under "Qualified Immunity".

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) states:

> The test for applying qualified immunity requires a finding that the official conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity is defeated if an official knew or reasonable should have known that the action that he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

The Respondents knew that a hearing was required following Petitioner's loss of federally protected rights of property (salary) and privilege (flight time), but failed to provide *any* hearing. In accordance with *Harlow, supra*, the Defendants are denied qualified immunity.

The state agency individual Respondents, having been stripped of their official capacity, and remaining only in their individual capacity, are subject to suit in the instant case. This allows monetary damages to be awarded against those Defendants. *Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

Respondent DPA falsely claimed that they were protected from suit by the Eleventh Amendment. In support of that false claim they cited *Edelman, supra*; *Young, supra*; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Papasam v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). It is ironic that these very cases cited by Respondent DPA strongly and clearly reinforce why DPA and CHP are *not* entitled to Eleventh Amendment protection, and the individual state agency Respondents and Does are *not* entitled to qualified immunity.

Finally, Respondent CAHP, and individual Does, have neither Eleventh Amendment nor qualified immunity protection, as they are not State agencies or State employees.

III.

RESPONDENTS CAHP AND DPA FALSELY CLAIM THAT A HEARING PROCESS, WHICH IS PROHIBITED BY LAW AND WHICH WAS DENIED PETITIONER, PROVIDED DUE PROCESS.

The Respondents have attempted to confuse the courts by continuing to argue that a collective bargaining arbitration process is applicable to the instant case, and that the arbitration process meets due process. That argument is moot. However, to protect Petitioner's right to argue the issue, the following is provided:

The only issue before this Court is whether Petitioner was denied due process by having been denied *any* hearing or trial, following loss of federally protected rights of property (salary) and privilege (flight time). The Respondents failed to provide *any* hearing, thus denying Petitioner due process. *Mathews, supra*; and *Parratt, supra*. The Respondents failed to provide the State Personnel Board hearing required by California law (Petitioner's Brief, p. 4). Denial of that hearing, required by law is a denial of due process (Petitioner's Brief, p. 7). *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875). The Respondents, while denying the hearing required by law, forced Petitioner into a form of hearing (Arbitration) prohibited by law, then denied even that hearing. The Respondents have continued to present issues which are moot, and cite cases which are inapplicable. All of the Respondents' arguments are non responsive to the issue before this Court, and do not overcome the law cited by Petitioner which establishes that he was denied due process when he was denied *any* hearing or trial.

CONCLUSION

PETITIONER WAS DENIED DUE PROCESS WHEN HE WAS DENIED *ANY* HEARING, FOLLOWING LOSS OF FEDERALLY PROTECTED RIGHTS OF PROPERTY (SALARY) AND PRIVILEGE (FLIGHT TIME).

The Respondents denied Petitioner due process by never providing *any* hearing, and the courts, without any discretionary powers to do so, subsequently denied Petitioner his right to jury trial. The Respondents have not provided any authority or argument which overcomes the law cited by Petitioner, which shows that he was denied due process. Instead, the Respondents, without filing a cross-petition, have attempted to raise issues not included in Petitioners' Brief, and which are moot.

Respondents DPA, CHP, named CHP Defendants, and Does, have no protection under either the Eleventh Amendment or qualified immunity.

Petitioner was denied his due process right to hearing and trial. The court should grant the Writ of Certiorari and rule per curiam, as requested in the Petition.

Respectfully submitted,

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